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In the

Supreme Court of the United States

October Term, 1952

LOIS MAXWELL SINCLAIR and FRED ELLIS YOUNGBLOOD, JR.,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS, AT AUSTIN, TEXAS, AND SUPPORTING BRIEF

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS, AT AUSTIN, TEXAS, AND SUPPORTING BRIEF

Petitioners, Lois Maxwell Sinclair and Fred Ellis Youngblood, Jr., pray that a Writ of Certiorari issue to review a judgment of the Court of Criminal Appeals of Texas, which was rendered by said Court on the 8th day of October, 1952, and which became a final judgment on the 14th day of January, 1953.

OPINION OF COURT OF CRIMINAL APPEALS

No. 25,836

LOIS MAXWELL SINCLAIR and FRED ELLIS YOUNGBLOOD, JR.,
Appellants,

v.

STATE OF TEXAS,
Appellee.

Appeal from Dallas County

OPINION

The conviction is for keeping or exhibiting for the purpose of gaming, a policy game, the punishment assessed against each of the appellants being two years in the penitentiary.

The offense was alleged to have been committed on or about November 22, 1950, at which time *Art. 619, Vernon's Ann. P. C.*, denounced the offense here charged in the following language:

> "If any person shall directly, or as agent or employee for another, or through any agent or agents, keep or exhibit for the purpose of gaming, any policy game, * * *, he shall be confined in the penitentiary not less than two nor more than four years * * *."

The indictment upon which appellants and 14 other persons were tried was returned on August 17, 1951, prior to which time *Art. 642(c), Vernon's Ann. P. C.*, had become effective. Said Article reads in part as follows:

> "Section 1. Any person who shall directly, or as agent, servant, or employee for another, or through any agent, servant, employee, or other person, keep or exhibit for the purpose of gaming, any policy game, shall be guilty of a felony and upon conviction shall be punished by confinement in the State penitentiary for any term of years not less than two (2) nor more than four (4).
>
> "* * *.
>
> "Section 5. Upon the trial for any offense under this Act it shall not be necessary for the State to allege or prove that money or other things of value was won or lost thereon.
>
> "Section 6. A conviction may be had for violation of any of the provisions of this Act upon the uncorroborated testimony of any accomplice. Any party to a transaction prohibited by this Act may be required to furnish evidence and testify, but after so furnishing evidence or so testifying, such person shall not be prosecuted with reference to any transaction about which he is required to furnish evidence and testify.
>
> "Section 7. Two (2) or more persons may be jointly indicted in single or multiple counts of the same indictment for the violation of any of the provisions of this Act, and at the election of the State be jointly tried; provided that upon any such joint trial the defendants may testify as witnesses for one another.
>
> "* * *.
>
> "Section 9. The provisions of this Act shall be cumulative of all existing provisions of the Penal Code of the State of Texas and in the event of a conflict between existing law and the provisions of this

act, the provisions of this Act shall prevail over existing law."

Appellants attack the sufficiency of the indictment, and contend that the latter statute under which they were tried and convicted deprived them of substantial rights and is ex post facto as to the offense charged which, if committed, was committed prior to the enactment of said *Art. 642(c) Ver. Ann. P. C.*

The law in force at the time of the offense charged gave appellants the right of severance, while under *Art. 642(c) Ver. Ann. P. C.*, under which they were indicted and tried, all of the defendants were subject to trial together.

We are in agreement with the ruling of the trial court to the effect that this change in the statute is a procedural change only. The new act provides that the co-defendants shall be competent witnesses for each other, and appellants were not deprived of any substantial rights and the new statute is not, therefore, ex post facto. See *16 C. J. S., Sec. 445, p. 896.*

Appellants attack that portion of the law under which they were tried and convicted which provides that it is unnecessary for the state to allege or prove that money or other things of value was lost or won.

The offense here charged under either of the Statutes above quoted does not necessarily involve the winning or losing of money or other valuable things. Neither "exhibiting" nor "keeping" necessarily includes the winning or losing of money or valuables, but only a showing or holding in readiness for the purpose of obtaining bettors. See *Wolz*

v. State, 3 Tex. R. 331; Kain v. State, 16 Tex. Cr. R. 282; Smith v. State, 28 Tex. Cr. R. 102.

(3) Appellants next contend that they were deprived of substantial rights because under the former law it was not compulsory that an accomplice testify for the state, whereas under Art. 642(c), the accomplice is required to testify, and a conviction may be had upon his uncorroborated testimony.

Art. 639, Ver. Ann. P. C., provides for compulsory process for witnesses to testify in cases arising under *Art. 619, P. C.*, and provides that a conviction may be had on the unsupported evidence of an accomplice. See *Hill v. State, 158 S. W. 2d 810.* No material change is observed by the enactment of Art. 642(c) in these respects.

(4) Finally, appellants contend that because there is no saving clause in Art. 642(c), which repealed the statutes in force at the time of the offense, the state is deprived of the right to prosecute appellants.

We overrule this contention. The statute defining the offense of which appellants were charged and convicted made no change in the definition of the offense. The provisions of the new act not found in the old define an additional offense of the grade of misdemeanor. Appellants, however, were convicted of the felony offense, the punishment for which was unchanged by the new act.

(5) Appellants insist that the testimony as to the conduct of the policy writers and pick-up men, outside the presence of appellants, was hearsay and inadmissible as to them.

They therefore urge that, disregarding such hearsay testimony, the evidence is not sufficient to show their guilt.

The evidence clearly establishes that a policy game was being kept and exhibited in Dallas County on or about the time alleged in the indictment. Several of the defendants were identified as policy writers, with whom bets were placed by officers using marked money. Others were shown to be pick-up men who received from the writers the money, less the writer's commission, along with duplicates or copies of the slips delivered to the bettors. When the policy writers were arrested, the duplicate slips and marked bills were recovered from them.

A search of the premises occupied by appellant Youngblood resulted in the finding of policy books and papers corresponding to the policy slips delivered to the purchasing officers.

One of the persons found in appellant Youngblood's place working with the policy papers testified that appellants were partners in the policy business, and that he had been hired by them, appellant Sinclair having instructed him in the case of a raid to destroy the papers.

The police officers who cooperated in securing the evidence as to the policy games had appellant Youngblood under surveillance for several days prior to the search of his residence, and testified that he regularly took sacks or bags which he obtained from his father's car to his home, and just as regularly delivered packages to one L. C. Crawford, and received other packages from him.

Bill No. 3 relates to the testimony of Ben J. Thomas to the effect that he placed several bets with Knox White on November 20th to 22nd, 1950, on policy games called Texas and New Orleans, Burma Road and Three Stars, and thereafter confiscated policy material from Knox White including the original or front sheets in the books where his bets were recorded, and marked bills which his fellow officer used in betting with Knox White. This is typical of the testimony which appellants say is hearsay as to them and should be disregarded.

It is contended that this testimony was inadmissible because appellants were not present and were not shown to have consented to or to have known of such conduct of White, and no conspiracy is alleged. We quote this contention from their brief:

> "No conspiracy was alleged or proved. If such had been the case, then the testimony of officers Stark and Thomas could have been admitted against appellants. Even if a conspiracy had been alleged it would first have to be established before the acts and declarations of one outside of the presence of appellants would be admissible against them."

The trial court in his qualifications to appellants' bill said:

> "The court certifies that these cases depended for conviction on circumstantial evidence and all matters complained of in this Bill were circumstances showing the operation of a policy game, and that there were other circumstances shown tending to connect the Defendants with this operation. To make out a Prima Facie case, it was necessary for the State to show all

> the circumstances of this policy game which connected the Defendants with the various operations thereof, leading on the whole to the conclusion that the policy game was being conducted, and the guilty participation of the principals."

We do not think that the absence of an allegation of a conspiracy is controlling.

The trial court defined a policy game as a game of betting on the appearance of numbers or combinations of numbers appearing on tickets or slips of paper, the player against the keeper, that certain numbers bet on by the player will appear out of a list of numbers selected by the keeper of the game.

A distinguishing feature of a policy game is that there must be a series of segregated acts which, taken together, comprise and make up the complete game. See *Thompson v. State, 180 S. W. 2d 944; Hill v. State, 158 S. W. 2d 810; Mooney v. State, 171 S. W. 2d 494.*

This court, in *Young v. State, 201 S. W. 2d 46,* quoted with approval the following passage from *Cox, et al. v. State, 8 Tex. App. 254, 255:*

> "* * * When two or more are found acting together, with an unlawful intent in the commission of an offense, the common design and acting together makes them ipso facto conspirators—endows them as a body with the attribute of individuality—merges the conspiracy to do the act in the act itself; and that the previous acts and declarations of each of any such principal offenders in pursuance of the agreed plan, and tending to throw light upon it or the motive or intent with which it was committed, is and should be

received as legal and admissible evidence against each and all, whether indicted, prosecuted, and tried jointly or separately."

Bill No. 1 complains of the closing argument of the district attorney during his discussion of the suspended sentence pleas of the defendants. The following occurred:

"Mr. Wade: * * * I would also, if I was a man trying to consider the suspended sentence, when a man's case came up before me, I would want him to plead guilty and say 'I am guilty of this thing.'

"Mr. Miller: Your Honor—

"Mr. Wade: But all of these pled not guilty.

"The Court: Just a minute. There is an objection.

"Mr. Miller: I hate to interrupt Mr. Wade's statement. He is so far afield from the record, I don't feel like this Court and jury is interested in what Mr. Wade might want in regard to a suspended sentence, and we object to him making that statement to the jury.

"The Court: Overruled.

"Mr. Wade: You may not be interested, as he said, in what I want, but I want to discuss it from my point of view on this thing. I WANT A MAN TO GET UP AND SAY THAT I AM GUILTY AND I WAS SORRY OF IT, AND IF YOU WILL GIVE ME ANOTHER CHANCE, I WON'T DO IT ANY MORE. But you have sixteen people here that when the case was called, said 'I am not guilty.'

"Mr. Martin: Just a minute, Your Honor. Now, those remarks what Mr. Wade would want them to get up and testify to, we object to that.

"The Court: Sustained. Disregard the remarks, gentlemen."

In their Bill No. 1, appellants contend that the foregoing remarks constitute a comment upon appellants' failure to testify.

The trial court qualified this bill and declined to certify that the argument was not provoked or invited. In fact, he certifies that the argument was in answer to defense counsel's argument.

No exception appears to have been reserved to the argument, appellants' counsel being apparently satisfied with the court's action in sustaining the objection made and instructing the jury to disregard the remarks.

We are unable to agree that the above remarks constituted a reference to appellants' failure to testify or that reversible error is shown by this bill.

We conclude that the evidence is sufficient to sustain the conviction and find no error requiring reversal.

The judgment is affirmed.

Woodley, Commissioner.

(Delivered October 8, 1952.)

Opinion approved by the Court.

OPINION OF THE COURT OF CRIMINAL APPEALS OVERRULING MOTION FOR REHEARING

No. 25,836

LOIS MAXWELL SINCLAIR and FRED ELLIS YOUNGBLOOD, JR.,
Appellants,

v.

STATE OF TEXAS,
Appellee.

Appeal from Dallas County

OPINION ON APPELLANTS' MOTION FOR REHEARING

Appellants renew their insistence that the so-called new statute *(Art. 642c, Vernon's P. C.)* is ex post facto as to them, and therefore is not applicable to or controlling in the instant trial. Especial emphasis is placed upon the contention that the right to a separate trial by the use of the severance statute has been destroyd by the new act, which was such as to injuriously change appellants' fundamental rights and therefore could not be and was not procedural.

The right preserved and guaranteed by the severance statute was to furnish to an accused the means by which he could make available the testimony of codefendants and co-indictees. The separate trial thereby accorded was a necessary incident to the fulfillment of that right, because of the statute prohibiting co-indictees from testifying for

one another. *Art. 711, C. C. P.* The new statute accorded to appellants the right which the severance statute preserved to them, for, by its express terms, provision was made whereby codefendants or co-indictees could testify as witnesses one for the other.

It is apparent, therefore, that the right conferred by the severance statute was expressly preserved to appellants under the new statute.

Appellants insist that the new statute is ex post facto as to them because it alters and allows a conviction upon the uncorroborated testimony of an accomplice and provides for compulsory testimony of codefendants.

We disposed of this contention, originally, upon the proposition that the new statute made no changes in the particulars pointed out and that both remedies were existent and controlling under the statute existing at the time the offense was alleged to have been committed.

The remaining contentions presented in the motion were all disposed of under our original holdings. It would serve no useful purpose to again state our conclusions relative thereto.

The motion for rehearing is overruled.

Davidson, Judge.

(Delivered December 17, 1952)

Opinion approved by the Court.

On January 14, 1953, the Court without written opinion denied second Motion for Rehearing.

JURISDICTION

The jurisdiction of this Court is invoked under *Section 1257 (3)* of *Title 28 U. S. C. A.* where the validity of *Article 642(c)* of the *Penal Code of the State of Texas* is questioned on the ground that it is inhibited by *Article 1, Section 10,* of the *United States Constitution,* prohibiting the passage by any State of an ex post facto law.

Petitioner Youngblood and 14 other persons (not necessary to name here) were separately indicted, charging a violation of *Article 619* of the *Penal Code of the State of Texas.* Said indictment charging each defendant did, "on or about the 22nd day of November 1950, unlawfully keep and exhibit, for the purpose of gaming, a policy game."

Neither of these 15 defendants were ever brought to trial. Thereafter on June 7th, 1951, the Texas Legislature passed a law, to-wit *Article 642(c) Penal Code* and it became effective June 15th, 1951, 6 months and 13 days after the commission of the alleged offense. Thereafter on the 17th day of August, 1951, Petitioner Youngblood and 14 other persons were re-indicted jointly and Petitioner Sinclair was jointly indicted in the same indictment. All 16 defendants were charged and jointly tried under the provisions of the new law, *Article 642(c) Penal Code.*

The case was tried to a jury and 13 defendants were assessed a punishment of 2 years suspended, one defendant given 90 days in jail, being convicted of the misdemeanor portion of the new law and Petitioners were given two years each in the penitentiary.

Petitioners seasonably filed and presented their motion to quash the indictment on the ground that the *Article 642(c) Penal Code*, under which the indictment was brought, was an ex post facto law and was in violation of *Article 1, Section 10* of the *United States Constitution.* The motion was denied by the trial court. On appeal to the Court of Criminal Appeals of Texas at Austin, Texas, this point was again presented. On October 8, 1952, the Court of Criminal Appeals of Texas rendered its opinion affirming the judgment of conviction and on the 17th day of December, 1952, a Motion for Rehearing was denied and on the 14th day of January, 1953, a second Motion for Rehearing was by the court denied, no written opinion was made, thereby making the judgment final. Petitioners have exhausted their State Court remedy and do hereby petition this Honorable Court for Writ of Certiorari to review the Final Judgment of the Court of Criminal Appeals of Texas, at Austin, Texas.

QUESTION PRESENTED

Is *Article 642(c) of the Penal Code of Texas*, ex post facto as to petitioners, since it was enacted and became effective 6 months and 13 days after the commission of the alleged offense, and within the inhibition of *Article 1, Section 10, Clause 3* of the *Constitution of the United States.*

STATUTES INVOLVED

Art. 619. 551. *Keeping or Exhibiting Gaming Table or Bank, etc.*

If any person shall directly, or as agent or employee for another, or through any agent or agents, keep or exhibit for the purpose of gaming, any policy game, any gaming table, bank, wheel or device of any name or description whatever, or any table, bank, wheel or device for the purpose of gaming which has no name, or any slot machine, any pigeon hole table, any jenny-lind table, or table of any kind whatsoever, regardless of the name or whether named or not, he shall be confined in the penitentiary not less than two nor more than four years regardless of whether any of the above mentioned games, tables, banks, wheels, devices or slot machines are licensed by law or not. Any such table, bank, wheel, machine or device shall be considered as used for gaming, if money or anything of value is bet thereon. *Acts 1907, p. 108; Acts 1913, p. 277.*

Art. 642c. *Policy Games*

Keeping or Exhibiting

Section 1. Any person who shall directly, or as agent, servant, or employee for another, or through any agent, servant, employee, or other person, keep or exhibit for the purpose of gaming, any policy game, shall be guilty of a felony and upon conviction shall be punished by confinement in the State penitentiary for any term of years not less than two (2) nor more than four (4).

Taking, Accepting or Placing Bets; Playing or Delivering Bets; Possessing Paraphernalia

Sec. 2. Any person who takes or accepts or places for another a bet or wager of money or other valuable thing upon any policy game; or any person who offers to take or accept or place for another a bet or wager of money or other valuable thing upon any policy game; or any person who plays or places or delivers a bet or wager of money or other valuable thing upon any policy game; or any person who shall possess except for evidence purposes, any writing, paper, print, number, device, press, policy slip, policy book, policy dream book, policy player's guide or article of any kind or character whatever designed or adaptable for use in connection with any policy game; or any person who aids or encourages in any manner in any of the offenses or acts named herein, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than One Hundred Dollars ($100) nor more than One Thousand Dollars ($1,000), or by imprisonment in the county jail for not less than thirty (30) days nor more than one (1) year, or by both such fine and imprisonment.

Permitting Use of Property

Sec. 3. Any owner, agent, lessor or lessee of any real or personal property who shall knowingly use or knowingly permit such property to be used in connection with any policy game shall be guilty of a misdemeanor and upon

conviction shall be punished as set forth under Section 2 of this Act.

Nuisances; Abatement; Bond

Sec. 4. Any room, place, building, structure, or property used in connection with any offense under this Act is hereby declared to be a public nuisance. Whenever the District Attorney, Criminal District Attorney, County Attorney, or Attorney General has reliable information that such a nuisance exists he shall file a suit in the name of the State in the county where the nuisance is alleged to exist to abate such nuisance. If judgment be in favor of the State then judgment shall be rendered abating such nuisance and enjoining the defendant or defendants from maintaining the same and ordering the said premises to be closed for one (1) year from date of said judgment unless the defendants in said suit or the owner, tenant or lessee of said property make bond payable to the State at the county seat of the county where such nuisance is found to exist in the penal sum of not less than One Thousand Dollars ($1,000) nor more than Five Thousand Dollars ($5,000) with good and sufficient sureties to be approved by the judge trying the case, conditioned that the acts prohibited in this Act shall not be done or permitted to be done in or upon said premises or the terms of the injunction violated. On the violation of any conditions of such bond or injunction the whole sum may be recovered as a penalty in the name of and for the State in the country where such conditions are violated, all such suits to be brought by the

District Attorney, Criminal District Attorney, or County Attorney of such county or the Attorney General of Texas.

Allegation and Proof

Sec. 5. Upon the trial for any offense under this Act it shall not be necessary for the State to allege or prove that money or other thing of value was won or lost thereon.

Accomplice Testimony; Compulsory Testimony

Sec. 6. A conviction may be had for violation of any of the provisions of this Act upon the uncorroborated testimony of any accomplice. Any party to a transaction prohibited by this Act may be required to furnish evidence or so testifying, such person shall not be prosecuted with reference to any transaction about which he is required to furnish evidence and testify.

Joint Indictment and Trial

Sec. 7. Two (2) or more persons may be jointly indicted in single or multiple counts of the same indictment for the violation of any of the provisions of this Act, and at the election of the State be jointly tried; provided that upon any such joint trial the defendants may testify as witnesses for one another.

Arrest Without Warrant

Sec. 8. It shall be the duty of all peace officers to arrest without warrant any and all persons violating any provisions of this Act, whenever such violation shall be committed within the view of such officer or officers.

Law Cumulative; Conflict With Existing Law

Sec. 9. The provisions of this Act shall be cumulative of all existing provisions of the Penal Code of the State of Texas and in the event of a conflict between existing law and the provisions of this Act, the provisions of this Act shall prevail over existing law.

Partial Invalidity

Sec. 10. If any clause, provision, requirement, or part of this Act shall, for any reason, be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not invalidate the remainder of this Act; but shall be confined in its operation to the clause, provision, requirement, or part hereof declared invalid. *Acts 1951, 52nd Leg., p. 781, ch. 434.*

STATEMENT OF THE CASE

Petitioners pointed out to the trial court in their motion to quash the indictment and to the Court of Criminal Appeals, that the new statute, *Art. 642(c)* of the *Penal Code of Texas*, under which they were jointly indicted and tried with 14 other persons, took from them valuable rights which they had under the old statute, Art. 619 in force at the time of the commission of the alleged offense.

We here set out the first indictment against Petitioner Youngblood.

Form 223—TRUE BILL—2M-1-50.

In the name and by the Authority of the State of Texas, the Grand Jurors, good and lawful men of the County of Dallas and State of Texas, duly elected, tried, impaneled, sworn and charged to inquire of offenses committed within the body of the said County of Dallas, upon their oaths do present in and to the Criminal District Court No. 2, of Dallas County, at the October Term, A.D. 1950, of said Court that one *Fred Ellis Youngblood, Jr.* on or about the 22nd day of November in the year of our Lord One Thousand Nine Hundred and 50 in the County and State Aforesaid, did then and there unlawfully keep and exhibit, for the purpose of gaming, a policy game.

Contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State.

P. J. Baker,
Foreman of the Grand Jury

WILL R. WILSON, JR.
Criminal District Attorney of Dallas County, Texas

A similar indictment was returned against the other 14 co-defendants.

We here set out the indictment returned after the passage of the new statute, Art. 642(c).

In the name and by the Authority of the State of Texas, the Grand Jurors, good and lawful men of the County of Dallas and State of Texas, duly elected, tried, impaneled, sworn and charged to inquire of offenses committed within

the body of the said County of Dallas, upon their oaths do present in and to the Criminal District Court of Dallas County, at the July Term, A.D. 1951, of said Court that *Lois Maxwell Sinclair, Sr., Fred Ellis Youngblood, Jr., R. A. McNeely, William D. Mayberry, Winfred Dorman Hinchliffe, Alex Wilson, L. C. Crawford, George Washington Williams, Cornelius Robinson, Frank Eugene Larkins, W. D. Williams, Knox White, Clarence Edward Smith, Tott Harper and Herbert Moses Williams*, and each of them on or about the 22nd day of November in the year of our Lord One Thousand Nine Hundred and 50, in the County and State aforesaid, did then and there unlawfully keep and exhibit, for the purpose of gaming, a policy game.

Contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State.

Justin S. McCarty,
Foreman of the Grand Jury

Henry Wade,
Criminal District Attorney
of Dallas County, Texas

It may be seen that the charge is the same as to all defendants regardless of whether the proof brings a defendant within the misdemeanor provisions of the Act. The benefits of the Suspended Sentence Law does not apply to misdemeanors in Texas.

Art. 776. Code of Criminal Procedure of Texas;

Texas Jurisprudence, Vol. 12, page 743, sec. 370.

Petitioners pointed out to the Court of Criminal Appeals that Article 642(c) was ex post facto as to them in the following particulars, to-wit:

1. The Statute destroys the right of a separate trial, which a defendant could secure to himself by filing a motion for severance under the old law.

2. The new Statute completely changes the rules of evidence in this type of case, as to the co-defendants testimony. Under the old law a co-defendant had to be first acquitted before he was eligible to testify and so stood before the jury fully exonorated, whereas under the new law he is stigmatized as a co-defendant in the eyes of the jury. Further if the State forces the testimony of the co-defendant, automatically immunity follows for the co-defendant, thereby holding out a strong inducement to a co-defendant to save himself by giving testimony for the State. Under the old law a co-defendant testifying for the State did not get immunity as a matter of right.

3. The new law so enlarges upon the old law that while it includes the definition of the old, so many new offenses of the grade of misdemeanor are created in the Act, it, in its operation of mass trial prevents a defendant from getting as fair a trial as he did under the old law. In this connection it is pointed out that the Indictment against all defendants read the same. The proof will develop that some of the defendants may be writers and one may possess a paper and one may possess a dream book and none of these persons are even acquainted with one another, but the jury hears all the evidence. It makes it possible for hearsay evidence to be considered against a defendant that never heard of the defendant about whom the evidence is directed primarily, the proof making one defendant a felon and the other a misdemeanor.

4. The new Statute enlarging upon the old, makes compulsory the testimony of co-defendants for the State, giving immunity to said witness for such testimony.

5. The new Statute makes it easier to procure a conviction than the rules of evidence would permit under the old Statute.

6. The new law reaches by its retrospective features and operation acts of Appellants previously committed.

7. The new law has altered the situation of the Appellants to their great disadvantage, making a conviction much more easily secured.

8. The new law creates at least 10 new offenses, misdemeanors, and had Appellants been convicted of this portion of the Statute (as they were charged) no benefits of the Suspended Sentence law could have been given them had the jury been inclined to give it.

9. That the new law and its enlargement on the old is not procedural only, but is a mixed question of procedural and substantive rights.

SPECIFICATION OF ERRORS URGED

The Court of Criminal Appeals of Texas erred:

1. **In its failure to decree that Article 642(c) of the Penal Code of Texas is an ex post facto law as to Petitioners.**

ARGUMENT AND AUTHORITIES

Petitioners contend that they have a fundamental right to have their guilt determined according to the law as it existed at the time of the alleged offense. That the passage

of a new law which so changed their situation, that they were forced to be tried in mass with 14 other defendants; a law which made it compulsory that a co-defendant testify against them; a law which would permit testimony against a co-defendant, proven guilty only of the grade of misdemeanor and hearsay as to them, to be considered also against petitioners, even though no conspiracy is alleged nor proven—placed them at so great a disadvantage, such law is ex post facto as to them.

It is conceded that a legislature has control of the modes of procedure, and may abolish courts and create new ones, and may prescribe altogether new modes of procedure in its discretion, it cannot, we think, in so doing dispense with any of the substantial protections, with which the pre-existing law surrounds a person accused of crime.

The test is, does the new statute take from the accused any protection which the old law and procedure gave him; does the new law put the accused to a greater disadvantage in defending himself? Does the new law make it easier for the State to convict? Does the new law make it more difficult for the accused to defend himself?

In *16 Corpus Juris Secundum, Constitutional Law, Section 435, page 886*, it is stated:

> "An ex post facto law is one which operating retrospectively and on penal or criminal matters only, renders previously innocent acts criminal, aggravates or increases the punishment for, a crime, alters the rules of evidence, penalizes an innocent act while assuming to regulate civil rights and remedies, *deprives*

an accused of some protection or defense previously available, or alters his situation to his disadvantage." (Italics supplied.)

In *Kring v. Missouri, 107 U. S. 506*, this Court in passing upon the point urged by petitioners said:

> "We are of the opinion that any law passed after the commission of an offense which, in the language of Washington, in U. S. v. Hall, 'In relation to that offense, or its consequences, alters the situation of a party to his disadvantage' is an *ex post facto* law, and in the language of Denio, in Hartung v. People, 'No one can be criminally punished in this country, except according to a law prescribed by the sovereign authority before the imputed offense was committed, and which existed as a law at the time."

In the *Kring* case, supra, the prosecution urged on the court that the change in the law was a procedural change in which Kring had no vested right. This is the position taken by the trial court and the Court of Criminal Appeals, against petitioners. This court, in the *Kring* case, speaking on the subject of whether it was a "procedural change" said:

> "And can any substantial right which the law gave the defendant at the time to which his guilt relates, be taken away from him by *ex post facto* legislation, because, in the use of a modern phrase, it is called a law of procedure? We think it cannot.

In *Lindsey v. Washington, 301 U. S. 397*, this Court speaking through Mr. Justice Stone said:

> "The Constitution forbids the application of any new punitive measure to a crime already committed,

to the detriment or material disadvantage of the wrongdoer?"

In *Louisiana v. Masino, 14 A. L. R. 2d 721*, the Supreme Court of Louisiana, cited *Kring v. Mo.*, supra, and other decisions of this Court, in upholding petitioners in their contention.

Following the decisions of this Court, a definition of an *ex post facto* law may be found in *United States v. Gafinkel, 69 Fed. Supp. 846*, in which many cases, new and old, are cited.

A comparison of Article 619, the old law which was in effect when the offense was committed with Article 642(c) under which the last indictment and trial was had, shows that it was not the intention of the legislature to make the new law retrospective in its operation.

CONCLUSION

Petitioners pray that this Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 668 21

LOIS MAXWELL SINCLAIR AND
FRED ELLIS YOUNGBLOOD, JR.,
Petitioners,

v.

STATE OF TEXAS
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

No. 663

LOIS MAXWELL SINCLAIR AND
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Petitioners,

v.

STATE OF TEXAS
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Petitioners, Lois Maxwell Sinclair and Fred Ellis Youngblood, Jr., were indicted, tried, and convicted in the District Court of Dallas County, Texas, for keeping and exhibiting for the purpose of gaming, a policy game, the punishment assessed against each of the Petitioners being two years in the penitentiary.

The offense was alleged to have been committed on or about November 22, 1950, at which time Article 619, Vernon's Texas Penal Code was applicable.

Article 642c, Vernon's Texas Penal Code, under which Petitioners were indicted, became effective on June 15, 1951. Both of these articles are fully set out in Petitioners' Brief on pages 15 through 19.

Petitioners filed two motions to quash the indictment, alleging that the law under which they were indicted was ex post facto as to Petitioners. Both motions were overruled on the ground that the changes were procedural only. Petitioner Youngblood filed a motion for severance, which was overruled by the trial court.

Petitioners urged the point that Article 642c was ex post facto as to them before the Texas Court of Criminal Appeals. The Court of Criminal Appeals affirmed the judgment of conviction of the trial court in opinion set out in full in Petitioners' Brief on pages 2 through 10 and overruled Petitioners' Motion for Rehearing in opinion set out in full in Petitioners' Brief on pages 11 and 12.

STATEMENT OF THE CASE

The crux of Petitioners' objections in their application for writ of certiorari can be narrowed to the following:

That Article 642c, Vernon's Texas Penal Code, under which they were jointly indicted and tried, took from them certain rights which they claim they had under Article 619, Vernon's Texas Penal Code, in force at the time of the commission of the offense, to-wit: (1) that Article 642c destroys the right of a separate trial which previously could be obtained by a motion for severance; (2) that Article 642c changes the law in effect at the time of the commission of the offense to give immunity to co-defendants following compulsory testimony, to Petitioners' disadvantage; (3) that Article 642c effects substantive changes as distinguished from procedural changes

and is therefore void as an ex post facto law; (4) that Article 642c created new offenses as misdemeanors, which could not have the benefit of the suspended sentence law.

RESPONDENT'S COUNTER POINTS

1. Article 642c preserves to Petitioners the right which the severance statute accorded to them, i.e., the testimony of co-defendants and co-indictees. (To Petitioners' 1st and 3rd Particulars.)

2. Article 642c does not change the law in effect at the time of the commission of the offense as to immunity following compulsory testimony. (To Petitioners' 2nd and 4th Particulars.)

3. Article 642c effects procedural changes only, as distinguished from substantive rights, and therefore is not void as an ex post facto law. (To Petitioners' 5th, 6th, 7th, and 9th Particulars.)

4. A Defendant cannot complain of a particular provision of a statute which does not harm him. (To Petitioners' 8th Particular.)

RESPONDENT'S COUNTER POINT ONE
(To Petitioners' 1st and 3rd Particulars)
(Restated)

Article 642c preserves to Petitioners the right which the severance statute accorded to them, i.e., the testimony of co-defendants and co-indictees.

Argument and Authorities

The law in force at the time of the offense gave Petitioners the right of severance, while under Art-

icle 642c, Vernon's Texas Penal Code, under which they were indicted and tried, the Petitioners were subject to trial together. This change is procedural only. The right guaranteed by the severance statute was to furnish to an accused the means by which he could make available the testimony of co-defendants and co-indictees. The separate trial thereby accorded was a necessary incident to the fulfillment of that right, because Article 711, Vernon's Texas Code of Criminal Procedure, prohibits co-defendants from testifying for each other. Article 711 reads as follows:

> "Persons charged as principals, accomplices or accessories, whether in the same or different indictments, cannot be introduced as witnesses for one another, but they may claim a severance; and, if any one or more be acquitted, or the prosecution against them be dismissed, they may testify in behalf of the others."

Article 642c preserves to Petitioners the right which the severance statute accorded to them, for, by its express terms, co-defendants and co-indictees may testify as witnesses one for the other.

It is apparent, therefore, that the right conferred by the severance statute was expressly preserved to Petitioners under Article 642c and such article makes no other change in the rules of evidence which would allow hearsay evidence to be presented against a Defendant, as insinuated by Petitioners in their third numbered particular.

Benefit

Dont need acquittal of Co-D for him to

Detriment

no chance of having acquitted co-D

RESPONDENT'S COUNTER POINT TWO
(To Petitioners' 2nd and 4th Particulars)
(Restated)

Article 642c does not change the law in effect at the time of the commission of the offense as to immunity following compulsory testimony.

Argument and Authorities

Article 639, Vernon's Texas Penal Code, which was in effect at the time of the commission of the offense, granted immunity as a matter of right to persons required to testify as to violations of gaming laws. Such Article reads as follows:

> "Any court, officer or tribunal having jurisdiction of any offense enumerated in this chapter, or any district or county attorney, may subpoena persons and compel their attendance as witnesses to testify as to the violation of any provision of the foregoing articles of this chapter. Any person so summoned and examined shall not be liable to prosecution for any violation of said articles about which he may testify. For any offense enumerated in said foregoing articles a conviction may be had upon the unsupported evidence of an accomplice or participant."

Thus, as pointed out in the opinion of the Texas Court of Criminal Appeals, it is readily seen that the enactment of Article 642c created no new inducement for co-defendants to testify to the prejudice of Petitioners as contended by Petitioners in their 2nd Particular. The law remains the same as before. Such immunity was and is a matter of right under Articles 639 and 642c respectively.

RESPONDENT'S COUNTER POINT THREE
(To Petitioners' 5th, 6th, 7th and 9th Particulars)
(Restated)

Article 642c effects procedural changes only, as distinguished from substantive rights, and therefore is not void as an ex post facto law.

Argument and Authorities

Since, as shown above, Article 642c does not deprive Petitioners of any substantial rights which they would have had under Article 619, the changes effected by Article 642c are procedural only.

In the case of *Beazell v. State of Ohio, et al.*, and *Chatfield v. State of Ohio, et al.*, (considered together) 269 U.S. 167, this Honorable Court passed on the same question as is raised in the instant case, in connection with a similar statute of the State of Ohio. The Ohio statute in question provided that:

> "When two or more persons are jointly indicted for a felony, except a capital offense, they shall be tried jointly, unless the court . . . order that one or more of said defendants shall be tried separately."

The Ohio law previously afforded the right of separate trial on application of defendant. In upholding the Ohio statute this Court ruled as follows:

> "The defendants severally made motions for separate trials on the ground that their defenses would be different, that each would be prejudiced by the introduction of evidence ad-

missible against his codefendant, but inadmissible as to him, and that they were entitled to separate trials as a matter of right, specifically charging that as applied to their own indictment and trial, 'the amendment to the statutes of Ohio making the granting of said application for a separate trial discretionary with the trial court, is an ex post facto law within the restrictions imposed by article 1, sec. 10, of the Constitution of the United States,' which provides that 'no state shall . . . pass any . . . ex post facto law.'

"It is settled . . . that any statute which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed is prohibited as an ex post facto . . ."

"But the statute of Ohio here drawn in question affects only the manner in which the trial of those jointly accused shall be conducted. It does not deprive the plaintiffs in error of any defense previously available, nor affect the criminal quality of the act charged. Nor does it change the legal definition of the offense or the punishment to be meted out. The quantum and kind of proof required to establish guilt, and all questions which may be considered by the court and jury in determining guilt or innocense, remain the same.

"Expressions are to be found in earlier judicial opinions to the effect that the constitutional limitation may be transgressed by alterations in the rules of evidence or procedure. See . . . Kring v. Missouri, 107 U.S. 221 . . . But it is now well settled that statutory changes in

the mode of trial or the rules of evidence, which do not deprive the accused of a defense and which operate only in a limited and unsubstantial manner to his disadvantage, are not prohibited. A statute which, after indictment, enlarges the class of persons who may be witnesses at the trial, by removing the disqualification of persons convicted of felony, is not an ex post facto law. Hopt v. Utah, 110 U.S. 575, 4 S. Ct. 202, 28 L. Ed. 262; nor is a statute which changes the rules of evidence after the indictment so as to render admissible against the accused evidence previously held inadmissible, Thompson v. Missouri, 171 U.S. 380, 18 S. Ct. 922, 43 L. Ed. 204 . . ."

If Petitioners mean to contend by their 5th and 7th Particulars that Section 5 of Article 642c effects a change to their disadvantage in providing that it shall not be necessary to allege or prove that money or other thing of value was won or lost, it should be noted that such was the law long before the enactment of Article 642c. See *Wolz v. State*, 33 Tex. 331 (1870).

RESPONDENT'S COUNTER POINT FOUR
(To Petitioners' 8th Particular)
(Restated)

A defendant cannot complain of a particular provision of a statute which does not harm him.

Argument and Authorities

Petitioners' 8th Particular that the new law creates new offenses, misdemeanors, and that had Petitioners been convicted under that portion of the stat-

ute, no benefits of the suspended sentence law could have been given them had the jury been inclined to give it, was not before the Court of Criminal Appeals. It was noted, however, that after Petitioners had filed their second motion for a rehearing before that Court, their attorney wrote a letter to one of the judges stating the above point. Petitioners' second motion for a rehearing was denied without a written opinion.

Petitioners were not convicted under the misdemeanor provisions of Article 642c. Therefore, they could not have been hurt by such provision, and consequently cannot be heard to complain thereof. See *Atwood v. State*, 121 S.W. 2d 353, 357 (Tex. Crim. 1938), and *State v. Cage*, 176 S.W. 928, 931 (Tex. Civ. App. 1915, error ref.).

CONCLUSION

It is respectfully submitted that this case is not a proper one for review by this Court, and that the petition for writ of certiorari should be denied.

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